IN THE

Supreme Court of the United States

No. 524

MAX SHAMOS,

Petitioner,
(Appellant below)

—against—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.
(Respondent below)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Max Shamos, respectfully shows:

Summary Statement.

Petitioner prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York made on July 19, 1945, affirming a judgment of conviction of your petitioner for the crime of grand larceny in the first degree rendered against him and entered in the Office of the Clerk of General Sessions of the County of New York on December 24, 1943. That judgment was affirmed in the Appellate Division on November 3, 1944, and in the Court of Appeals on July 19, 1945; both without opinion.

Jurisdictional Statement.

Petitioner alleges that by reason of an aggregation of substantial errors committed upon the trial, he was denied

due process of law within the meaning of the Fourteenth Amendment of the United States Constitution, within the rule enunciated in:

Buchalter v. *New York,* 319 U. S. 427;
Snyder v. *Commonwealth of Mass.,* 291 U. S. 97;
Lisbana v. *California,* 314 U. S. 219;
Pierre v. *Louisiana,* 306 U. S. 354.

A federal question was raised by your petitioner in his appeal to the Court of Appeals of the State of New York and that is sufficient to confer jurisdiction upon this Court even if no federal question was raised upon the trial. (*Home Insurance Company* v. *Dick,* 281 U. S. 397.)

Your petitioner quotes from the defendant-appellant's brief in the Court of Appeals, which said brief was duly filed in that Court and became a part of the record of this case in that Court:

"POINT VIII.

THE DEFENDANT DID NOT RECEIVE A FAIR TRIAL AND WAS DEPRIVED OF MANY OF HIS CONSTITUTIONAL RIGHTS AND PRIVILEGES.

The defendant is entitled to a fair trial. This is his constitutional right. His trial should be conducted in an unprejudiced and unbiased atmosphere. The Court should conduct the trial impartially and rule properly upon the evidence and testimony. The district attorney, as a quasi-judicial officer, should conduct himself with some restraint and with a view of affording a defendant a fair trial.

It cannot be denied but that the revengeful and hateful attitude of the district attorney and the hostile

attitude of the court brought a conviction of this defendant, upon improper testimony and evidence, and with a complete disregard for legal evidence."

If this jurisdictional statement is thin, then we assume that this Court will remit the proceeding to the Court of Appeals for amplification.

A Skeletonized Statement of the Facts Preliminary to a Recital of the Alleged Errors.

Petitioner was indicted, tried and convicted of grand larceny in the first degree for feloniously obtaining by trick and device from the complainant, Ethel Witz, $2100 on January 13, 1940.

Upon the trial, the People proved that two persons, Rose Cohen and Julia Weinstein, in the years 1939 to 1941 obtained from the complainant different advances amounting to $20,000 upon the representations that they, these women, were to invest the money with Max Shamos, the defendant in the criminal case and petitioner here, who had a mysterious and undescribed invention and that complainant "would receive $1000 for every $100 invested" (fols. 165, 168, 199).

On the Julia Weinstein trial she swore he did not say anything about an invention (fols. 280-281). She gave no evidence on the Shamos trial that either she or the women represented defendant's great wealth. Attorney Rosenblum put two nails in his client's coffin by testifying that defendant represented his wealth in seven figures, and he said something about patents (fol. 428).

No conspiracy was alleged in the indictment and neither the names nor the acts of Rose Cohen and Julia Weinstein were referred to (fols. 17 and 19). Complainant testified that defendant's name and identity were not disclosed to

her until after she had advanced substantial sums over two or three months time (fol. 295), commencing in March, 1939 (fol. 228).

The People's only proof of defendant's guilt was the testimony of complainant that after complainant had advanced $6000 (fol. 198) on January 13, 1940, defendant in the presence of Rose Cohen and Julia Weinstein and three other people, participated in these representations to complainant and caused her to go immediately to her savings bank and withdraw and give to Rose Cohen and Julia Weinstein $2100. Defendant did not go to the bank (fol. 185), and there was no evidence that the defendant (your petitioner) received any of these moneys at any time.

His only participation in the conspiracy (Complainant, fol. 242) was this one interview which lasted twenty minutes on January 13, 1940 in an apartment, "It wasn't too light; it was pretty light" (fol. 237). Complainant's description of the defendant was seriously attacked; at the Julia Weinstein trial complainant swore defendant was a dark man (fol. 243), whereas she admitted on the Shamos trial that he was light (fol. 238); she could not see whether he had hair or not (fol. 237); she described the wrong kind of glasses he wore (fols. 234, 611); whether the name was Shamos, Shimmel or Shamiel (fols. 263, 268); her testimony on the Weinstein trial that he handed out "Mason" cards for identification was changed in the Shamos trial where she swore that the cards were "Odd Fellows" (fols. 267, 269).

Of the five people present, the District Attorney called no one to corroborate complainant. Defendant (your petitioner) did not take the stand but he called three of them, and they categorically denied any such transaction. Julia Weinstein (fols. 808-809), Sam Vogelhut (fols. 669, 674), Sophie Wilner, who swore she had never seen the defendant (fol.

633). The District Attorney in his summation praised his failure to call these witnesses; said it showed:

> "how fair a trial this dirty, rotten, behind-the-scenes swindler is getting in this Court" (fol. 1196).

Complainant never saw defendant again until the Julia Weinstein trial, April 1943 (fols. 1187 and 241).

With the People's proof of defendant's conviction perhaps insufficient to warrant conviction, the District Attorney called to the witness stand defendant's former attorney to give damaging testimony of defendant's prior confidential communications.

The Major Errors Committed Upon the Trial; Which in the Aggregate Resulted in Denial of Petitioner's Constitutional Right to a Fair Trial and Resulted in His Conviction Without Due Process of Law.

(1)

Over the objection and exception of defendant (fol. 419) one Jacob J. Rosenblum, an attorney, testified on defendant's trial in November, 1943, to confidential communications made to him by the defendant in February, 1942, implicating him, in the opinion of Attorney Rosenblum, in the crimes of Rose Cohen and Julia Weinstein (fols. 429, 430, 433, 453, 472, 562). The attorney was employed to obtain an adjournment in the Rose Cohen matter to permit the defendant to make restitution (fol. 467), and if defendant failed to make restitution, he was to go to the General Sessions represented by Attorney Rosenblum and answer fully all questions put to him by the judge (fol. 477). This, of course, implied a waiver of immunity. Attorney Rosenblum received $1000 on account of his fees which for the whole matter would have been $5000 (fols. 539 and 479). At that time, Rose Cohen had been convicted and sentenced to 15 to 30 years imprisonment (fol. 518); but in the opinion of

Attorney Rosenblum, that sentence might be greatly lightened and even imprisonment avoided if restitution was made (Rosenblum, fols. 514, 519). The purpose of the adjournment was to give the defendant thirty to sixty days within which to raise $40,000 to $50,000 to make restitution, $20,000 to complainant and the balance to other victims (fols. 428 and 199). Further facts with citations from the record will be given in our annexed brief. Suffice it to say for the moment that the attorney's testimony of his former client's confidential admissions was the crucial proof in the case.

The admission of this evidence was in direct violation of the statutes of the State of New York and the fundamental right of a citizen to have the mouth of his attorney sealed; a right which has been scrupulously observed for three hundred years in all the courts of this country. (Cases cited in our brief.)

(2)

Proof was submitted at the trial of other larcenies besides the one upon which petitioner was indicted, but they were crimes committed by Rose Cohen and Julia Weinstein and no connection of the defendant therewith was shown. They were admitted as the acts of co-conspirators.

(3)

Proof was admitted of the conviction of Rose Cohen and Julia Weinstein as co-conspirators which is incompetent evidence of the guilt of the defendant where their trials were separate. The District Attorney in his summation went to the extent of saying that another jury had convicted Julia Weinstein in five minutes (fol. 1136). Rose Cohen had been sentenced to fifteen to thirty years imprisonment (fol. 513) and Julia Weinstein faced a similar sentence (fol. 1136).

(4)

The Court admitted into evidence $2,000,000 of promissory notes given by Rose Cohen and Julia Weinstein on April 14, 1941 (fol. 203), long after the last larceny in October, 1940 (fol. 200), and more than a year after the defendant's one and only appearance on January 13, 1940; and with no evidence that defendant had knowledge thereof. No proof was given by the People of the circumstances inducing the giving of these notes except the District Attorney's cross-examination of defendant's witness, Julia Weinstein, who testified that she had given the notes when complainant threatened her: "She wanted to throw acid in my face" (fol. 837).

(5)

A summation by the District Attorney so violative of the law and the defendant's rights, and so vitriolic as to destroy even the semblance of a fair trial. Under the law of the State of New York, a public prosecutor differs from a private attorney and may not resort to invective or name-calling. We quote from a leading New York decision:

> "Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartially that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment." (People v. Fielding, 158 N. Y. 547.)

(6)

The Judge's charge was unfair from beginning to end. The only disputed issue was whether or not the complainant identified defendant, as her visitor on January 13, 1940. The Judge charged the jury as an uncontroverted matter that she identified the defendant (fol. 1274). The Charge failed to call the attention of the jury to the fact that of the five witnesses present, the People had called no one and the defendant called three who had categorically denied the entire story.

The entire charge was a summation of the varied and many crimes of Rose Cohen and Julia Weinstein with only a passing reference to defendant's disputed connection therewith.

There was an utter failure to delineate the conflicting proof on the cardinal issue and the weight of the evidence, and a failure to instruct the jury to weigh the uncorroborated, impeached evidence of the complainant in the light of her interest to force restitution.

> "A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert." (Quercia v. U. S. 466, 469.)

Prayer for Writ.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the Court of Appeals of the State of New York commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require

and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., October 17, 1945.

MAX SHAMOS,
Petitioner.

ALVIN CUSHING CASS,
Counsel for Petitioner,
1 Cedar Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

On this 17th day of October, 1945 before me personally appeared Max Shamos, to me known and known to me to be the petitioner described in and who executed the foregoing petition, and he duly acknowledged to me that he executed the same.

.....

MAURICE FREIMAN,
Notary Public, N. Y. County
N. Y. County Clk's #241
Reg. #380 F 7
Commission Expires March 30, 1947

IN THE

Supreme Court of the United States

No.

MAX SHAMOS,

Petitioner,
(Appellant below)

—against—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.
(Respondent below)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

There was an extraordinary number of reversible errors committed upon the trial, beyond successful dispute. The first issue presented here arises on the most serious:

(1) Whether the admission of the testimony of an attorney against his former client involves a mere rule of New York State evidence and trial procedure, or whether the admission of that evidence:

> "Offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Snyder v. Commonwealth of Mass., 219 U. S. at p. 105.)

(2) The second proposition is whether the aggregation of errors at the trial; including admission of damaging and highly incompetent proof; the vituperative and illegal sum-

mation of the District Attorney; and a charge of the Court so basically wrong and prejudicial as to deny a fair consideration by the jury of the only controverted defense (the identity of the defendant on his alleged one and only appearance, January 13, 1940); taken together:

> "* * * were such as to deprive petitioner of a trial according to the accepted course of legal procedure." (*Buchalter* v. *State of N. Y.*, 319 U. S. 427.)

POINT I.

The admission of the testimony of defendant's attorney, one Jacob J. Rosenblum, of confidential communications theretofore made to him by his client, the defendant, was a violation of the defendant's (petitioner's) fundamental rights.

The ruling is so shocking that this Court should make a pronouncement which will prevent such things re-occurring in the State of New York, or any other state.

In February, 1942, defendant went to Mr. Rosenblum and retained him to arrange an adjournment of the *Rose Cohen* case (fol. 467). She was then awaiting an order of commitment but she might be reprieved, if she made restitution (Rosenblum fols. 514, 519).

The purpose of the adjournment was to give the defendant time to raise funds to make restitution to the complainant and other victims, to the amount of $40,000 to $50,000 (Rosenblum fol. 454). Mr. Rosenblum told defendant he was doubtful whether he would accept the case and he refused to accept the retainer until he should satisfy himself of the truth of the defendant's story from one Dr. Reicher (fol. 446). He required that Dr. Reicher be brought to his office (fol. 416); cross examined him and learned these facts:

Dr. Reicher was under moral obligation to Rose Cohen who had recommended patients to him when he came to New York years before to practice medicine and at a time when he needed patients "quite badly" (Rosenblum fol. 425). Defendant was boasting of his wealth in seven figures from some invention (Rosenblum fol. 428), and Dr. Reicher besought defendant to make restitution for Rose Cohen (Rosenblum fol. 424). Defendant owed Dr. Reicher money which he expected to collect (fol. 384). So a chain of innocent acts was presented.

Mr. Rosenblum, admitting that both men denied complicity in the crimes (fols. 472, 562), told his client that his volunteering to make restitution would likely involve him in the crime and the District Attorney would think he was the real thief.

> "I think I should say this—on a number of occasions he did say that he did not receive any of that money, and I said to him at the time, 'The District Attorney, however, doesn't know it and *they may have an idea that maybe you are the thief in this thing.*'" (fol. 562). (Italics ours.)

Rosenblum insisted that he should be free to disclose the facts and identity of his client to the criminal authorities, and if indictment and trial followed, he should be free to testify against his client at the trial.

> "* * * so that I didn't find myself possibly in a part of this court where I could say, 'I would like to testify but I can't, because by law I am not permitted to'; it carries an inference—and I explained that to him" (fol. 434).

It was arranged that Rosenblum should apply for the adjournment without disclosing the identity of his client if possible; only in the event that Rosenblum took the case

(fols. 435-6); further provided that if the defendant failed to make restitution within the thirty day adjournment, the attorney should then disclose the identity of his client (Rosenblum fol. 477). Three days later, Rosenblum went to the District Attorney and obtained the adjournment without disclosing the names of his clients (Rosenblum fol. 474). Rosenblum accepted $1000 on account of $5000 of fees (fols. 479, 530). Not only did Rosenblum testify to these damning facts; but incredibly enough, he deliberately conveyed to the jury the impression that he believed his client was guilty.

> "A. He did on a number of occasions—I think I should say this—he did on a number of occasions say that he did not receive any of that money, and I said to him at the time, 'The District Attorney, however, doesn't know it and they may have an idea that maybe you are the thief in this thing—they have no way of telling—and there may be an investigation, and therefore I want to be relieved of this privilege.' I said, 'I don't doubt you, but I don't know whether you did or you didn't, but I have a specific job to do.'
>
> Q. And he denied it? A. Yes, but I never accused him of it because I didn't know. *Don't ask me what I thought*" (fol. 563). (Italics ours.)

When defendant's attorney protested against such proof going before the jury, the District Attorney aggravated the offense by emphasizing its force and effect. He answered the attorney's protesting question to the witness by volunteering the statement that the question that he (defendant's attorney) put to the witness "tries to leave the implication that Mr. Rosenblum believed the defendant to be an honest man" (fol. 564).

To cap the climax, the trial judge then intervened. Instead, however, of directing the withdrawal of a juror, or

instructing the jury to disregard the evidence, or criticizing the witness for willfully smearing his client, the judge put to the witness a question tending to excuse the witness of having failed to accuse his client of larceny; thus cementing in the minds of the jury the establishment of defendant's guilt.

> "The Court: I think Mr. Rosenblum said he did not accuse him because he did not know.
>
> The Witness: That is right and I want the jury to know I have no knowledge either way" (fol. 564).

Mr. Rosenblum had been portrayed to the jury as a former prominent Assistant District Attorney in charge of the Homicide Bureau, a trustbuster, a member of a Wall Street firm (fols. 407-410; 1144, 1201). Of course, defendant's chances of a fair consideration by the jury went aglimmering, when they heard defendant's confession:

> "* * * to his own lawyer who stands almost in the position of his own rabbi or priest" (District Attorney's Summation, fol. 1122).

POINT II.

Under the law of the State of New York, and under the unanimous decisions of the courts of this country, the attorney (Rosenblum) was forbidden to disclose the identity of his client or any remark that his client made because of their confidential relationship.

The Civil Practice Act, which is the controlling statutory law of the State of New York, provides as follows:

> "*Sec. 353. Attorneys and their employees not to disclose communications.* An attorney or counselor at law shall not be allowed to disclose a communication, made

by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

The improper testimony of the attorney was admitted by the trial judge upon two grounds. The first was that the client at the time he consulted his attorney in February, 1942, gave an oral waiver of the privilege (fol. 440). This did not make the testimony competent. Indeed, the seal on the attorney's lips would not amount to very much if the attorney was allowed to destroy the privilege by swearing to a waiver. It is the client and not the attorney who must do the waiving. The State of New York has gone to the extent of specifically providing that any waiver given by the client previous to the attempted testimony of the attorney is insufficient even if that waiver be in writing. We quote from Section 354 of the Civil Practice Act:

"*Sec. 354. Application of sections relating to confidential communications.* The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver."

The testimony of an attorney to confidential communications is barred as a matter of fundamental right, and is indispensable for the administration of justice.

"If a person cannot consult his legal adviser without being liable to have the interview made public the

next day, by an examination enforced by the Court, the law would be little short of despotic, it would be a prohibition upon professional advice and assistance." (Insurance Co. v. Schafer, 94 U. S. 457.)

"The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose, and the law holds that testimony incompetent." (Chirax v. Reinicker, 11 Wheat. 280.)

In speaking of this rule, we find in "Thornton on Attorneys At Law, Vol. I, Chapter VI, Privileged Communications" the following pertinent language:

"The very application of this rule, from a very early period in the history of the law, has been upheld by the courts as of supreme importance in the administration of justice; and it has wisely been left untouched by any of the statutes in modern times which have so liberally removed restrictions from the rules of evidence * * * " (p. 156).

"The rule as to privileged communications was applied, apparently for the first time, in the case of Berd v. Lovelace, and for three centuries at least it has been steadily upheld by the courts on the ground that, for the proper administration of the law, the confidence which it encourages the client to repose in the attorney to whom he resorts for legal advice and assistance, should upon all occasions be inviolable, because greater mischiefs would

probably result from requiring or permitting its disclosure than from wholly rejecting evidence thereof. The rule is not one of mere professional conduct" (p. 158).

See also Wigmore on Evidence, 3rd Edition, Vol. VIII, Communications between Attorney and Client, Sections 2290 to 2329.

POINT III.

The confidential communications made by the defendant to attorney Rosenblum did not lose their privileged character because of the presence of a third party, Dr. Reicher, as claimed by the District Attorney.

When the defendant went to Mr. Rosenblum with his story, he was told by the attorney that the attorney would have to investigate further before he would decide whether to take the case or not (Rosenblum fol. 431). He required the defendant to bring to his office Dr. Reicher (Rosenblum fol. 416). Then the attorney cross-examined Dr. Reicher and obtained corroboration of the defendant's story, including among other things, that it was he, Dr. Reicher, who was intervening on behalf of Rose Cohen and trying to get the defendant to make restitution because he, the defendant, was a "dear friend" who owed him (Dr. Reicher) money which he expected to be repaid (fol. 384).

Attorney Rosenblum treated both Dr. Reicher and Shamos as joint clients.

> "Mr. Shamos and Dr. Reicher were advised by Mr. Rosenblum that the circumstances were unusual and that there was some possibility that investigation might be started since the District Attorney may get the idea that they were the persons who received the proceeds of the moneys obtained from Mrs. Cohen" (fol. 472).

Mr. Rosenblum went to the extent (a strange substitute for legal evidence) of repeating to the jury how he had previously expressed to the District Attorney doubts of his client's innocence.

> "* * * I explained to Mr. Gelb (Assistant District Attorney) very fully that I didn't know just what the position of these people was, whether they were involved or whether not involved, that it was very unusual, that the circumstances were very peculiar, but that I could not see how Mr. Gelb could be harmed any, or that Rose Cohen could be harmed any, or that any of the victims could be harmed any, if my purpose were to come in to insist that restitution was made" (fol. 453).

Mr. Rosenblum's formal memorandum of February 25, 1942 shows he treated the two men as one client.

> "Mr. Rosenblum was advised *by all parties concerned* that it was agreeable for him today, on February 25, 1942, to proceed * * *" (fol. 476).

This was so from the beginning:

> "I explained to *them* that the crime was a most serious one * * *" (fol. 430).
>
> "*They* asked me if I would take the case and I told *them* that I couldn't tell *them*; I told *them* I wasn't entirely sure whether I cared to take this case" (fol. 431).
>
> "I told *them* that I wanted to consider the matter fully and *they* wanted to know why" (fol. 431).

An arrangement was made with Attorney Rosenblum so that if defendant and Dr. Reicher ever became involved through the efforts at restitution, Dr. Reicher would go with Rosenblum, as his attorney, as well as the defendant, and they would both answer any questions the Court would propound.

"Mr. Rosenblum, however, was first to advise the Judge that he would prefer not to reveal the names until the thirty day period had elapsed, and that at that time either Mr. Shamos or Dr. Reicher or both would be then willing to go with Mr. Rosenblum and see Judge Donnellan and answer any questions that he would put to them regarding this matter" (fol. 477).

The law in the State of New York is that the presence of a third person does not destroy the privileged character of the conference provided the third person also stands in the same confidential position as the client against whom the attorney is asked to testify. Furthermore, if the third person is used as a means of communication between the attorney and the client, he then, also, becomes a party to the privilege.

People v. *Buchanan*, 145 N. Y. Page 1, at page 26;
Wigmore on Evidence (Paragraph 2312) citing
Wallace v. *Wallace*, 216 N. Y. page 36.

The statement of what these two men said to the District Attorney and the Judge of General Sessions through their mouthpiece, attorney Rosenblum, in their effort to aid justice through restitution again was a privileged communication. (Thornton on Attorneys at Law, Volume I, Chapter VI, Section 104.)

IN CONCLUSION.

It is not necessary for us to argue in detail the complete absence of due process of law in the trial of Max Shamos. There was a plethora of reversible errors. We have not referred to the less important.

(a) The District Attorney in his summation vouching for the honesty and credibility of the complainant (fol. 1133).

(b) His extended, unfounded accusation (and defense thereto) that defendant's attorney was accusing him, the District Attorney, of subornation of perjury (fols. 1188-1195).

(c) His attempt to prejudice the jury against defendant for defendant's failure to take the witness stand (fols. 1229-1230).

(d) His accusation that Rose Cohen and Julia Weinstein were the dupes of defendant, in the complete absence of any direct or circumstantial evidence.

> "* * * or is it a fact that this dirty swindler sat in room after room with Rose Cohen and Julia Weinstein and sold them a bill of goods like you have never seen in your lives" (fol. 1133).

(e) His appeal to the jury that defendant was the actual thief, based on defendant's luxurious living (fol. 1159).

We pass all these things to come to that proposition which affects the administration of justice in every case.

An attorney was allowed to testify to confidential communications made to him by a client; permitted to go on to say that although the client denied guilt, his statements to his attorney implicated him in the crime; and to finally add, without judicial restraint or reproof, to swear that he, the attorney, was satisfied of the client's guilt, and failed to prosecute him because he didn't have legal evidence. It is time for the Supreme Court of the United States to step in with a ruling that the Fourteenth Amendment of the United States Constitution cannot be thus flouted.

Respectfully submitted,

ALVIN CUSHING CASS,
Attorney for Petitioner.

Supreme Court of the United States

January Term, 1946

No. 524

MAX SHAMOS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

RESPONDENT'S BRIEF

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New York County

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Of Counsel

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

RESPONDENT'S BRIEF

Proceedings Below

The petitioner was convicted, on December 24, 1943, in the Court of General Sessions of New York County, State of New York, of the crime of Grand Larceny in the First Degree (Penal Law, §§1290, 1294) (37-8).* That judgment was unanimously affirmed without opinion by the Appellate Division of the Supreme Court (268 App. Div. 892), and by the Court of Appeals of the State of New York (294 N. Y. 948).

* References are to folios in the printed record.

Jurisdiction

The jurisdiction of this Court is invoked upon the claim that the petitioner was denied due process of law by a series of rulings of the trial court admitting in evidence certain conversations between the petitioner and one Jacob J. Rosenblum, an attorney.

Questions Presented

The questions presented are:

(a) Was any constitutional right of the petitioner violated by the rulings now under attack? and, if so,

(b) did the petitioner properly present his constitutional claims in the state courts?

Statement of the Case

The petitioner's conviction of grand larceny resulted from his participation in a scheme or confidence game whereby he and two woman accomplices, Rose Cohen and Julia Weinstein, defrauded one Mrs. Ethel Witz of some $20,000, her entire life savings.

Mrs. Witz' contact with this group was, for the most part, with the Cohen and Weinstein women who made the majority of the misrepresentations to her concerning an allegedly momentous secret invention of the petitioner and who received her various payments as "investments" in that project. In one instance, however, Mrs. Witz met the petitioner himself who then and there succeeded in extracting $2,100 from her (125-40). It is that specific larceny of which he was accused and convicted.

The only issue seriously disputed at the trial was the identity of the petitioner as the man who met and swindled Mrs. Witz on that occasion. The principal prosecution witness was the victim herself who unequivocally identified him as the culprit (123-4). To buttress her evidence on that score, the People called one Jacob J. Rosenblum, an attorney, who connected the petitioner with the case by designating him as a man who went to extreme lengths in an attempt to mitigate the punishment of one of his already-convicted woman accomplices; and who testified to conversations with the petitioner indicating the latter's familiarity with the nature of the misrepresentations by which Mrs. Witz had been defrauded.

So far as relevant to the constitutional contentions here advanced, Rosenblum testified that he had been first retained by the petitioner after the accomplice Rose Cohen had been convicted for her share in the larceny; that the purpose of his retainer was to represent Mrs. Cohen in the matter of sentence; and that he had been authorized to offer the petitioner's money as restitution in her behalf (410-5, 423-4, 443-59). Rosenblum further testified that substantially all his conversations with the petitioner had been in the presence of third persons who were not lawyers (418, 422 *et seq.*, 740-5); and, in addition, that all conversations with the petitioner were conducted with the distinct understanding that no confidence was to attach, and that Rosenblum was to be at liberty to disclose to the Court of General Sessions and to the prosecuting authorities everything that the petitioner said to him (440-1).

POINT I

On the merits, the trial court's rulings admitting the Rosenblum testimony in evidence violated neither the New York Statute nor the Federal Constitution.

A. The ruling attacked was in accord with settled New York practice.

The petitioner's contention that the Rosenblum testimony was privileged from disclosure and, hence, that its admission constituted error "Under the law of the State of New York" (petitioner's Point II, pp. 15-18) is met at the threshold by two immutable facts: (a) substantially all of the Rosenblum conversations were had in the presence of at least one third person who was not an attorney (418, 422-6, 751-2); and (b) all of the conversations were had with the distinct understanding that their content was to be communicated to the District Attorney of New York County and to the Court of General Sessions (440-1). Either of these facts would have been sufficient in itself to destroy the privileged nature of the communication [*People* v. *Buchanan* (1895) 145 N. Y. 1, 26; *Wallace* v. *Wallace* (1915) 216 N. Y. 28, 36; *Bartlett* v. *Bunn* (Gen. Term, 3rd Dept., 1890) 56 Hun 507, 508].

In *People* v. *Buchanan, supra,* 145 N. Y. 1, the New York Court of Appeals authoritatively stated the doctrine that the presence of a third person at a conference between an attorney and client destroys the privileged nature of any communications made in such conference. Thus, the Court declared (at p. 26):

> "The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for and are supposed to be confided to the lawyer, to guide him in giving his professional aid and advice. I am not

> aware of any extension of the rule, which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend."

The principle that no privilege attaches to statements made to an attorney which are intended to be communicated to others finds clear expression in *Bartlett* v. *Bunn, supra,* 56 Hun 507. After setting forth the statutory provision insuring the privileged character of confidential communications, the Court continued (p. 508):

> "But * * * when the communication is made for the purpose of its publication or communication to another it necessarily loses its privileged character, and section 836 of the Code provides expressly for such waiver.
>
> "It follows, therefore, that when from the very nature of the communication it was designed by the author for another, and to be communicated to such other, it loses its character as privileged."

The petitioner's ingenious argument that Dr. Reicher, the layman present at his conferences with the attorney Rosenblum, was also a client of Rosenblum's, is not supported by the record. Apart from that, it is a sufficient answer to that contention that it was never raised in the trial court or in the Court of Appeals and, consequently, is not here available [see cases cited at Point II, *infra*].

B. The New York rule, as applied by the state courts herein, contravenes no constitutional privilege.

In answer to the petitioner's argument that the rule of evidence above discussed is so outrageous as to contravene the defendant's constitutional rights, it is sufficient to note that the identical ruling prevails in the federal courts as well as in the courts of almost every state of the union [see *U. S.* v. *Cotter* (C. C. A. 2nd 1932) 60 Fed. (2d) 689, 691; cert. denied 287 U. S. 666; *Tutson* v. *Holland* (Ct. of App. Dist. of Col. 1931) 50 Fed. (2d) 338, 340, cert. den.

284 U. S. 632; *York* v. *United States* (C. C. A. 8th 1915) 224 Fed. 88, 91; 8 Wigmore *on Evidence* (3d Ed. 1941) §2311, pp. 600-603 and cases cited].

Wigmore states the proposition as follows:

> "The [attorney-client] privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure * * * ceases when the client does not appear to have been desirous of secrecy. 'The moment confidence ceases,' said Lord Eldon, 'privilege ceases,' This much is universally conceded."
>
> * * *
>
> "One of the circumstances, by which it is commonly apparent that the communication is not confidential, is the *presence of a third person,* not being the agent of either client or attorney." (italics in original)

It can hardly be said, therefore, that the ruling in question is such as to deprive the petitioner "of a trial according to the accepted course of legal proceedings" [*Buchalter* v. *New York* (1943) 319 U. S. 427, 431].

POINT II

In any event, the petitioner raised no constitutional question in the state courts.

Examination of the record of the trial discloses that the Constitution of the United States was not even indirectly referred to during the time the witness Rosenblum was on the stand (404-566). Moreover, it was never contended in any state appellate court that the admission of Rosenblum's testimony deprived the petitioner of any right guaranteed him by the Federal Constitution. Indeed, the only reference to the Constitution contained in the petitioner's brief before the Court of Appeals in the State

of New York is the general statement quoted at pages two to three of the petition to the general effect that "The defendant [petitioner] did not receive a fair trial and was deprived of many of his constitutional rights and privileges."

We shall not burden this Court with a discussion of the cases establishing that such a record presents no constitutional question for decision in this Court [see *Herndon* v. *United States* (1935) 295 U. S. 441, 442-443; *House* v. *Road Imp. Dist.* (1924) 266 U. S. 175, 176; *Bowe* v. *Scott* (1914) 233 U. S. 658, 665; *Thomas* v. *Iowa* (1908) 209 U. S. 258, 263; *Harding* v. *Illinois* (1904) 196 U. S. 78, 86-88; *Miller* v. *Cornwall Railroad Company* (1897) 168 U. S. 131, 134].

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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